Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	MM Docket No. 95-31
Reexamination of the Comparative	)	
Standards for Noncommercial	)	
Educational Applicants	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION OF

CENTER FOR MEDIA EDUCATION, CITIZENS FOR INDEPENDENT PUBLIC BROADCASTING, CIVIL RIGHTS FORUM, CULTURAL ENVIRONMENT MOVEMENT, and MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL (CME *et al.*)

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave. N.W., Ste. 312
Washington, D.C. 20001
202-662-9546

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Counsel for CME *et al.*

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The Center for Media Education, Citizens for Independent Public Broadcasting, Civil Rights Forum, Coalition for Noncommercial Media, Cultural Environment Movement, and Minority Media and Telecommunications Council ("CME *et al.*"), by their attorneys the Institute for Public Representation, respectfully submit the following opposition to certain petitions for reconsideration of the Commission's *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 00-120, MM Docket 95-31 (rel. April 21, 2000) ("*NCE Order*"). In the *NCE Order*, the Commission adopted a point system to select among competing applicants for noncommercial educational ("NCE") broadcast licenses. CME *et al.* specifically oppose the petitions of parties contesting the validity of the Established Local Applicant credit adopted under the point system and challenging the constitutionality of the localism and the State-Wide Network credits.

I. THE ESTABLISHED LOCAL APPLICANT CREDIT DOES NOT VIOLATE *BECHTEL* BECAUSE IT REASONABLY PROMOTES THE COMMISSION'S TRADITIONAL INTEREST IN ADVANCING LOCALISM.

A few petitioners contend that the Commission's decision to award localism points for an Established Local Applicant is arbitrary and capricious. *See* Petition for Reconsideration of Broadcasting for the Challenged, Inc., MM Dkt. No. 95-31("BFCI Petition"); Petition for Reconsideration of the Educational Media Foundation., MM Dkt. No. 95-31 ("EMF Petition").

These petitioners principally maintain that the Established Local Applicant credit runs afoul of *Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993). *See* BCFI Petition at 12, EMF Petition at 10.

But as the Commission convincingly demonstrated in the *NCE Order*, the adopted Established Local Applicant credit does not raise the concerns evidenced in *Bechtel. NCE Order* at ¶¶ 41 - 48. The Established Local Applicant credit does not lack the permanence identified in *Bechtel* because the Commission's four year holding period will ensure that the chosen applicant will remain local. *Id.* at ¶ 48. Moreover, substantial evidence cited by the Commission shows that locally established NCE entities tend to provide local programming for their communities. *Id.* In contrast, the *Bechtel* Court found that the FCC had not offered any evidence that the integration policy in fact achieved the benefits the Commission attributed to it. Finally, contrary to the integration policy in *Bechtel*, the Established Local Applicant credit does not dictate a preferred business structure or practice. Rather, *inter alia*, the instant policy is premised on the "recognition that education historically is a local undertaking, as evidenced by the historical importance of localism in noncommercial educational broadcasting." *Id.* at ¶ 49.

Moreover, there is ample evidence that national networks do not cater their programming to local needs. For example, in the radio industry, consolidation by national conglomerates has led to a proliferation of cookie cutter national news formats replacing localized programming. *See e.g.,* Andrew J. Schwartzman, *Viacom/CBS Merger: Media Competition and Consolidation in the New Millennium*, 53 FED. COMM. L. J. 513 (2000) (explaining how one national network provides the news services to some 1,700 radio stations). The Commission recently created the Low Power FM service to combat the massive concentration of the media industry, finding that community based radio entities would help meet the need for local informational programming.

Creation of Low Power Radio Service Decision, MM Dkt. No. 99-25 (rel. Jan. 27, 2000). But LPFM alone cannot fully address the paucity of local broadcast programming. *See* Petition for Reconsideration of NFCB/CME *et al.*, MM Dkt. No. 95-31 at 8-9. Thus, it is appropriate for the Commission to partially address the need for local programming by emphasizing localism in NCE applicant eligibility by adopting an Established Local Applicant credit. The credit is a reasonable first step to further the well-established interest the Commission has in maintaining and promoting a broadcast system premised on serving the educational and informational needs of the local community.[1]

II. THE ESTABLISHED LOCAL APPLICANT AND STATE-WIDE NETWORK CREDITS DO NOT VIOLATE THE FIRST AMENDMENT.

In addition to contesting the Established Local Applicant credit as arbitrary and capricious, EMF argues that the point system violates the First Amendment. *See* ECFM Petition at 16-23. Essentially, EMF argues that because the Established Local Applicant and Statewide Network credits "prefer" a certain group of speakers over another, the criteria is inconsistent with the First Amendment. *Id.* For the reasons discussed below, EMF's argument is wholly untenable.

A. EMF Does Not Have A First Amendment Right to an NCE License.

From the onset, EMF's understanding of the relationship between the First Amendment and broadcasting is flawed. It is axiomatic that no one has a First Amendment right to a broadcast license. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969). Because

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[1] As indicated in its petition for reconsideration, CME *et al.* believe the Commission should go one step further and allot credits for NCE applicants who promise to air a minimum amount of localized programming. *See* NFCB/CME *et al.* Petition at 2-9.

there are more applicants than licenses available, the Commission is charged by statute to assign specific frequencies to specific users. *See FCC v. NextWave Personal Communications, Inc.* 200 F.3d 43, 50 (2d Cir. 1999). In other words, because of spectrum scarcity, the Commission must necessarily select one applicant over another in the public interest. So even if the FCC's selection process did result in EMF not obtaining a license, there would be no First Amendment violation. *See Red Lion,* 367 U.S. at 389.[2]

B. The Commission's Selection Criteria is Not Subject to Strict Scrutiny.

EMF's contention that the Commission's selection criteria is subject to strict scrutiny is also incorrect. EMF claims that strict scrutiny applies whenever a regulation distinguishes between speakers or speech. *See* EMF Petition at 16-17. But the Supreme Court has explicitly rejected such a broad principle. *See Turner Broadcasting v. FCC,* 512 U.S. 622, 656 (1994) (*Turner I*) ("To the extent appellant's argument rests on the view that all regulations distinguishing between speakers warrant strict scrutiny ... it is mistaken."). Indeed, "such heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristics' of the medium being regulated." *Id.* at 660-61 (citations omitted).

The Supreme Court has long recognized that "each medium of expression ... must be assessed for First Amendment purposes by the standards suited to it, for each may present its own problems." *Id.* at 657 (citations omitted). *See also FCC v. League of Women Voters,* 468

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[2] Arguably the denial of the application could be unlawful if it were based on the content or viewpoint of the speaker. However, as elaborated in Part II.C. *infra,* the Established Local Applicant and State-Wide Network credits are objective, speaker and subject matter neutral criteria that further recognized tenets of telecommunications policy.

U.S. 364, 377. With respect to broadcasting, the Supreme Court has traditionally held that the special attributes inherent to this medium call for a more relaxed review of broadcast regulation that is not applicable to other speakers. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997)(citations omitted). Under this relaxed standard of review, the credits are clearly constitutional because the "special characteristics" of broadcasting, namely scarcity, necessitate that the Commission select one applicant over another. And the criteria at issue adopted by the Commission to select the applicant, the Established Local Applicant and State-Wide Network credits, directly further the important goals of localism and education. *See NCE Order* at ¶¶ 41-61.

C. In Any Event, the Established Local Applicant and State-Wide Network Credits are Content-Neutral and Withstand Intermediate Scrutiny.

But even if the credits were subject to a higher level of scrutiny, the standard would be no more than intermediate review. Strict scrutiny only applies if the regulation reflects a governmental preference for the content or viewpoint of a particular speaker. *Turner I*, 512 U.S. at 658-9. If the regulation is content-neutral, then it is subject to the less exacting standard of intermediate scrutiny. *Time Warner Entertainment v. U.S.*, 211 F.2d 1313 (D.C. Cir. 2000) (*Time Warner II*). "The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* at 1316 (citations omitted). As discussed below, the Established Local Applicant and State-Wide Network credits are content-neutral because they are objective criteria, applied across the board to all applicants, that "do not require or prohibit the carriage of particular ideas or points of view." *Turner I*, 512 U.S. at 645-46. EMF's assertion that the

credits were crafted to exclude religious broadcasters to the benefit of "state actors," *see* EMF Petition at 17-19, is pure speculation that is unsupported by the record.[3]

The Commission adopted the Established Local Applicant credit because "localism was a principle on which the NCE service was built." *NCE Order* at ¶ 44.[4] As discussed in Part I, *supra*, the Established Local Applicant credit directly advances the FCC's traditional interest in promoting localism. Moreover in the order, the Commission stressed the neutrality of the credit. The "localism credit is religion neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit." *NCE Order* at ¶ 52. Thus, the content or viewpoint of the speaker is irrelevant. In fact, several religious broadcasters supported the Established Local Applicant credit. *See e.g.*, Comments of Colorado Christian University at 12-13, MM Dkt. No. 95-31.

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[3] EMF's baseless contention that the Commission may have gone through the seven hundred or so pending NCE applications in order to craft a point system that would specifically exclude religious broadcasters is ridiculous. *See* EMF Petition at 22. First, there is no evidence demonstrating a Commission animus against religious broadcasters. Indeed, there are currently 1,731 radio and 285 television stations licensed to religious broadcasters. *See* Jerold M. Starr. *Signal Degradation*, AMERICAN PROSPECT, Aug. 14, 2000, at 22. Of these licenses, over 700 radio stations and 23 television stations are broadcast on the reserved NCE spectrum. *Id.* Second, anyone remotely familiar with the FCC is fully aware that neither the Commission, nor its staff, has the time, the resources, or the inclination to evaluate every single pending NCE application to carry out this speculative "anti-religion agenda."

[4] Contrary to EMF's contentions, the Commission's concerns with preventing small local educators from being "'squeezed out' by large national chains" is grounded in preserving localism and a diversity of information sources, not some specious "anti-religion bias." *NCE Order* at ¶ 34. In *Turner Broadcasting v. FCC*, 520 U.S. 180, 189-94 (1997), the Supreme Court upheld the cable must-carry rules precisely because the regulations promoted localism and the diversity of information sources available to the public, notwithstanding that the must-carry rules tangentially burdened cable operators speech rights.

The State-Wide Network credit is also content neutral. EMF's contention that the State-Wide Network credit favors "state-sponsored" speech or "state actors" is unsupported by the new rules or the record. The Commission explicitly determined that private, as well as public, institutions are eligible for the State-Wide Network credit. *NCE Order* at ¶¶ 58-59.[5] The credit therefore does not favor a "state actor." [6] There is also absolutely no requisite that the entity provide "state-sponsored" speech or anything remotely close to it in order to qualify for the points. *See NCE Order* at ¶ 58. The State-Wide Network credit does not favor content or conduit. Its purpose is solely to advance the important content-neutral governmental interest in providing noncommercial educational programming to the public. *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (*Time Warner I*), *reh'g en banc denied*, 105 F.3d 723 (D.C. Cir. 1997) (upholding constitutionality of DBS noncommercial

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[5] To qualify for the State-Wide Network credit, the private entity must: 1) have authority over a minimum number of local schools (private or public) and provide programming to such schools; 2) be considered an institute of higher learning (private or public) with a minimum number of campuses and provide programming to such campuses; or 3) regularly provide programming for local private or public schools or private or public institutions of higher learning. *See NCE Order* at ¶ 58.

[6] EMF's understanding of what constitutes a "state actor" is misguided. EMF apparently believes that all entities who receive even a modicum of government funding are considered state actors "as a matter of law." *See* EMF Petition at 18. But this simplistic construction is clearly incorrect. The hundreds of public broadcasting affiliates, whose only connection to a government body is that they receive funding from CPB or a state entity, cannot be presumptively considered state actors. A state actor inquiry is incredibly fact specific. *See* Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 391- 414 (1997). Indeed, the mere fact that an entity is funded by the government does not mean it is considered a state actor. *See e.g., San Franciso Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987)(holding that notwithstanding that the USOC was federally funded, founded by government charter, and regulated by federal law, it was not a government actor for constitutional purposes.). In many cases, the nexus between the local PBS affiliate and the government body will therefore be far too attenuated to consider the licensee a "state actor."

educational channel set aside because, *inter alia*, the law was content-neutral). In sum, because the credits do not make "reference to the ideas or views expressed" they are content neutral and are not subject to strict scrutiny. *See Time Warner II,* 211 F.3d at 1316.

1. The Established Local Applicant and State-Wide Network credits withstand intermediate scrutiny.

A content neutral regulation passes constitutional muster if it advances an important governmental interest, unrelated to the suppression of speech, and does not burden any more speech than necessary to further those interests. *Time Warner II,* 211 F.3d at 1318. The Established Local Applicant and State-Wide Network credits withstand this examination. First, the credits advance the important governmental interests of localism and education. "[T]he importance of local broadcasting can scarcely be exaggerated." *Turner I,* 512 U.S. at 663. Educational programming is also a governmental interest of the highest priority.[7] Moreover, the credits further these interests in a manner unrelated to the suppression of speech. Any NCE applicant can obtain the credits so long as it is locally based or supplies programming to an educational institution. *See* Part II.C. *supra* at 6-7. Finally, based on substantial evidence, the Commission reasonably inferred that granting localism credits to locally established entities and education network credits to entities providing programming to schools or universities would further the stated important governmental interests. *Id.*

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[7] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460, § 2(a)(8)(A) ("[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens.")

2. EMF's reliance on *Grosjean* and its progeny is misplaced.

However, EMF argues that even if the Established Local Applicant and State-Wide Network credits are facially content-neutral, the credits are invalid because they allegedly act to the detriment of an ascertainable group of speakers. *See* EMF Petition at 22. EMF's reliance on the Supreme Court's line of tax discrimination cases levied against the press to support this proposition is misguided.[8]

The fact that a law singles out a certain medium, or a subset thereof, "is insufficient by itself to raise First Amendment concerns." *See Leathers v. Medlock*, 499 U.S. 439, 452 (1991). In *Leathers*, the Court upheld the constitutionality of the application of a state tax to cable systems, notwithstanding that print and satellite services were exempt from taxation. The *Leathers* Court explained that laws that tax one medium, or speakers within a medium, "are constitutionally suspect only in certain circumstances." *Id.* at 444. The key ingredients identified by the Supreme Court in these cases are "the dangers of suppression and manipulation" of speech. *See Turner I,* 512 U.S. at 661. As long as these concerns are not evident, "differential treatment is 'justified by some special characteristics of' the particular medium being regulated." Id. at 660-661.

Thus, *Grosjean* and its progeny are inapplicable. In this case, because of the scarcity of frequencies available, the Commission must necessarily distinguish among speakers. *See NBC v. U.S.*, 319 U.S. 190, 226 (1943). Moreover, as discussed above, the Established Local Applicant

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[8] *See* EMF Petition at 22 (*citing Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)).

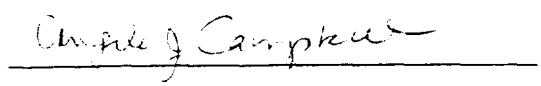
credits and the State-Wide Network credits are not aimed at suppressing any content or viewpoint. Under both credits, the content provided by an applicant and its viewpoint, whether religious or otherwise, is irrelevant. The credits are also applied across the board to all applicants, whether the applicant is sectarian or secular. Therefore, there is no danger of suppression or manipulation of speech. Indeed, the point system is structured to further First Amendment values, such as localism and education, rather than to suppress speech.

In sum, the Established Local Applicant and State-Wide Network credits are subject to the relaxed review traditionally afforded to broadcast regulation and do not warrant strict scrutiny. Because the credits are objective, content and viewpoint neutral criteria that advance long respected telecommunications policies, the point system easily withstands First Amendment review.

CONCLUSION

For the foregoing reasons, the FCC should summarily dismiss the petitions for reconsideration of BCFI and EMF objecting to the adopted point system's Established Local Applicant and State-Wide Network credits. The credits are more than adequately supported by the record and do not remotely impinge on the First Amendment rights of NCE applicants.

Respectfully submitted,



Angela J. Campbell
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., Suite 312
Washington, DC 20001
(202) 662-9535

Counsel for CME *et al.*

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

August 3, 2000

Certificate of Service

I, Angela J. Campbell, hereby certify that a copy of the foregoing "Opposition to Petitions for Reconsideration of CME *et al.*" was sent this Thursday, August 3, 2000, via first class mail, postage prepaid to:

Stephan C. Simpson
Counsel for Broadcasting for the Challenged, Inc.
1090 Vermont Avenue, N.W. , Ste. 800
Washington, D.C. 20005

Robert C. Fisher
Bryan T. McGinnis
Brendan Holland
Amy L. Van de Kerckhove
Counsel for the Educational Media Foundation
SHAW PITTMAN
2300 N Street, NW
Washington, D.C. 20037

August 3, 2000

Angela J. Campbell